

[2023] PBRA 117

Application for Reconsideration by Stoner-Seed

Application

1. This is an application by Stoner-Seed (the Applicant) for reconsideration of a decision of a panel of the Parole Board (the Panel) dated 5 May 2023 following an oral hearing held remotely by video on 27 April 2023. The Panel decided not to direct the Applicant's release.
2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the Parole Board Rules) provides that applications for reconsideration may be made in eligible cases (as set out in Rule 28(2)) either on the basis (a) that the decision contains an error of law, (b) that it is irrational and/or (c) that it is procedurally unfair.
3. I have considered the application on the papers. The papers are:
 - an application for reconsideration dated 18 May 2023 (the application) submitted by the Applicant's solicitors;
 - the Panel's decision dated 5 May 2023; and
 - a dossier of 631 numbered pages.
4. I have also listened to parts of the Panel's recording of the hearing which was five hours and 11 minutes in duration in total.

Background

5. In August 1988, the Applicant met the three victims of the index offences in a nightclub and was invited back to their flat. The 17-year-old female victim and her boyfriend went to bed leaving the Applicant and the 20-year-old female victim together. The 20-year-old female victim rejected the Applicant's sexual advances. After she had fallen asleep, in revenge, the Applicant placed greasy paper on her body and set fire to it. The Applicant then left the flat locking the door so that the victims could not escape. The house caught fire. The victims suffered serious burns and the 17-year-old victim died two weeks later as a result of her injuries. The Applicant was 25 years old at the time the index offences were committed and is now 60 years old.
6. The Applicant pleaded not guilty and has continued to maintain his innocence of the index offences throughout his sentence. He did not give evidence at his trial but claimed that the fire either started accidentally or was caused by someone else after



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he left. On 10 May 1989, the Applicant was convicted of murder, wounding with intent to do grievous bodily harm, and arson with intent to endanger life. He was given life sentences for the murder and wounding with intent with a minimum term of 15 years in each case and a concurrent determinate sentence of seven years for the arson offence. The minimum term applicable to the life sentences expired on 8 August 2003.

7. The Applicant progressed to open conditions in August 2013. He absconded from the open estate in January 2015 and was unlawfully at large until his arrest in February 2015. The Applicant was released in May 2016 and recalled in October 2016 following a search of his room at approved premises where a pair of heavy-duty handcuffs, a packet of condoms, and a Hello Kitty bag containing non-human bones were found. The Applicant had also been overheard speaking to another resident about meeting a female.
8. The Applicant progressed to open conditions for a second time in July 2020. Concerns about the contents of a letter written by the Applicant to another prisoner led to him being returned to the closed estate in August 2020. However, in March 2021, his Category D status was reinstated, and he returned to open conditions in August 2021. In February 2022, the Applicant absconded from the open estate for a second time. He contacted the police via Facebook and was arrested and returned to custody. He was later convicted of escaping from custody and given a sentence of imprisonment of four weeks. As the Applicant has absconded from the open estate on two occasions, he is currently not eligible to return there.

Request for Reconsideration

9. The application is dated 18 May 2023. The application submits that the Panel's decision, "*is flawed due to procedural unfairness and irrationality*" and it is further submitted that "*the procedural defects did impact on the decision making of the Panel in this case*".
10. The grounds for seeking a reconsideration are as follows:
11. **Ground 1 - Irrationality:** It is submitted that the Panel failed to give adequate reasons for its conclusions, and in particular, for disagreeing with professional opinion in favour of the Applicant's release and with professional opinion that any further risk reduction work did not constitute core risk reduction work. It is also submitted that the Panel failed to give full reasons to explain why the proposed risk management plan (RMP) is not robust enough to manage risk in the community.

In support of those submissions, the following points are made in the application: (i) all the witnesses agreed that the Applicant had completed all core risk reduction work in prison; (ii) while it would be beneficial for the Applicant to undertake cognitive behavioural therapy (CBT) or work on anxiety, neither was assessed as essential to reduce his risk; (iii) no courses had been suggested other than CBT and work on anxiety; (iv) both psychologist witnesses agreed that risk could be managed in the community; (v) the RMP was robust as it included accommodation in the form of approved premises, input from the Offender Personality Disorder Pathway, the approved premises had access to psychological input, the Applicant

would be offered MBT (mentalisation-based therapy) (which is misspelt as MDT in the application), and there was a valid Care Act assessment in place setting out the Applicant's entitlement to support from the local authority; (vi) it was accepted that there were concerns about compliance with the licence in the community but this, it was submitted, was due to existing mental health conditions. This situation would not change and needed to be managed by external controls which were in place; and (vii) there was no evidence before the Panel that the Applicant's non-compliance with his licence would result in a risk of serious harm to the public. It was said that the Applicant had not committed any violence for decades, that there was no current arson risk, and that no offences of harm had been committed since the index offences in the 1980s.

12. **Ground 2 - Irrationality:** It is submitted that since the Applicant was not eligible for a move to open conditions, asking the professionals for their views and recommendations about whether the Applicant met the test for open conditions was not relevant to the Panel's assessment of risk and it was not appropriate to ponder about it. It is also argued that the test for open conditions was not fully considered and that if it was unfair to discuss open conditions, it was more unfair still not to discuss it fully leading to "*a sieving of views, recommendations and pathway*". It is submitted that to seek a professional view on the criteria for open conditions was a misdirection. It is submitted that this led to "*an incorrect reading of the evidence and a skewed approach to applying the Parole Board test*".
13. **Ground 3 – Procedural unfairness:** It is submitted that the Panel placed weight on the recall and the circumstances surrounding the recall and disregarded the Applicant's account of the recall. It is further submitted that the Panel placed weight on factually incorrect information and misdirected itself. It is argued that this was procedurally incorrect and caused significant unfairness to the Applicant.

The factual errors made by the Panel are said to be: (i) the Applicant did not make contact with and meet a female in breach of his licence. It is said that he had a female pen friend who was in prison and that he was not developing a relationship with her and was not able to make plans to meet her; and (ii) the Applicant did not attempt to make contact with his birth mother. It is said that this (presumably referring to the factual errors) was not evidence of non-compliance or breach of licence. Several points are made about offences ordered to lie on the file. The application notes that the Panel correctly recorded that two offences of arson were ordered to lie on the file but states that the offences were not accepted or proven. It is noted that the Panel also recorded that a further nine arson offences were left to lie on the file. It is said that this is disputed by the Applicant and that he was not charged with a further nine arson offences.

Current parole review

14. The Secretary of State originally referred the Applicant's case to the Parole Board on 3 February 2021. At the time the Applicant was in closed conditions having been removed from open conditions in August 2020. The Parole Board was asked to consider whether or not it would be appropriate to direct the Applicant's release and if release was not considered to be appropriate, it was invited to advise whether the Applicant should be transferred to open conditions.

15. The Applicant's case was directed to an oral hearing on 2 August 2021. On 4 August 2021, the Applicant was returned to open conditions following a review of his case. A remote hearing was due to take place to review the Applicant's case on 6 December 2021. The hearing appears to have taken place but was adjourned on the day because the Panel considered that it did not have sufficient information to make an informed assessment of risk. The Panel made directions to obtain further information including directing a psychological risk assessment of the Applicant. It was agreed that the hearing would reconvene on 12 May 2022.
16. In February 2022, the Applicant absconded from the open estate. As a result of his second absconcion, an amended referral from the Secretary of State, which is undated, stated that the Applicant was not eligible to be considered for a transfer to open conditions.
17. On 26 April 2022, the Applicant's review was adjourned before the hearing due to take place on 12 May 2022 in response to information from the Applicant's legal representative that the Applicant had been returned to the closed estate, that he was being assessed following a head injury in prison before he absconded, and that a neuropsychological assessment was being commissioned. Further detailed directions were made in the adjournment decision. A further adjournment was sought by the Applicant's legal representative in December 2022 to permit her time to obtain a local authority Care Act assessment and to make a referral to a specialist supported housing provider. An adjournment was not granted, and the hearing proceeded on 16 January 2023, when it was adjourned on the day for further reports and information. It was agreed that the hearing would resume on 27 April 2023.
18. A full hearing to review the Applicant's case was conducted by the Panel on 27 April 2023 remotely by video. The Panel was comprised of two independent members and a specialist psychologist member. The Panel had considered a dossier of 631 numbered pages which included several psychological reports and addenda from a prison psychologist and a prisoner-commissioned psychologist, a neuropsychological assessment dated 4 July 2022, a prisoner commissioned psychiatric assessment dated 23 August 2022, a report from a local authority social care assessment dated 28 March 2023, and an NHS report dated 3 February 2023 and a report from the Applicant's community offender manager (COM) dated 17 April 2023.
19. At the hearing, evidence was taken from the Applicant's previous prison offender manager, his current prison offender manager (POM), the prison psychologist (Prison Psychologist), the prisoner-commissioned psychologist (PC Psychologist), a local authority support worker, and the COM. The Applicant also gave evidence to the Panel.

The Relevant Law

20. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined.
21. The panel correctly sets out the test for release in its decision letter dated 5 May 2023. The test is automatically set out within the Parole Board's template for oral hearing decisions.

Parole Board Rules 2019 (as amended)

22. Under Rule 28(1) of the Parole Board Rules 2019 the only types of decisions which are eligible for reconsideration are those concerning whether the prisoner is or is not suitable for release on licence. Such a decision is eligible for reconsideration whether it is made by a paper panel (Rule 19(1)(a) or (b)) or by an oral hearing panel after an oral hearing (Rule 25(1)) or by an oral hearing panel which makes the decision on the papers (Rule 21(7)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (Rule 31(6) or Rule 31(6A)).
23. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These are indeterminate sentences (Rule 28(2)(a)), extended sentences (Rule 28(2)(b)), certain types of determinate sentence subject to initial release by the Parole Board (Rule 28(2)(c)) and serious terrorism sentences (Rule 28(2)(d)).

Irrationality

24. In **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin)**, the Divisional Court set out the test for irrationality to be applied in judicial reviews of Parole Board decisions. It said at paragraph 116,

"The issue is whether the release decision was so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

25. This test was set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374**. The Divisional Court in **DSD** went on to indicate that in deciding whether a decision of the Parole Board was irrational, due deference had to be given to the expertise of the Parole Board in making decisions relating to parole. The Board, when considering whether or not to direct a reconsideration, will adopt the same high standard for establishing 'irrationality'. The fact that Rule 28 contains the same adjective as is used in judicial review shows that the same test is to be applied.
26. The application of this test has been confirmed in previous decisions on applications for reconsideration under Rule 28: **Preston [2019] PBRA 1** and others.

Procedural unfairness

27. Procedural unfairness means that there was some procedural impropriety or unfairness resulting in the proceedings being fundamentally flawed and therefore, producing a manifestly unfair, flawed or unjust result. These issues (which focus on how the decision was made) are entirely separate to the issue of irrationality which focusses on the actual decision.
28. In summary an Applicant seeking to complain of procedural unfairness under Rule 28 must satisfy me that either:

- (a) Express procedures laid down by law were not followed in the making of the relevant decision;
- (b) They were not given a fair hearing;
- (c) They were not properly informed of the case against them;
- (d) They were prevented from putting their case properly; and/or
- (e) The panel was not impartial.

The overriding objective is to ensure that the Applicant's case was dealt with justly.

Duty to give reasons

29. The importance of giving adequate reasons in decisions of the Parole Board has been made clear in cases such as **Wells v The Parole Board [2019] EWHC 2710 (Admin)** and **Stokes v The Parole Board [2020] EWHC 1885 (Admin)**.
30. It is suggested that a panel's conclusions are best tested by asking whether the conclusions reached can be justified on the basis of the evidence placed before it, while giving due deference to a panel's experience and expertise.
31. In **Oyston [2000] PLR 45**, at paragraph 47 Lord Bingham said: "*It seems to me generally desirable that the Board should identify in broad terms the matters judged by the Board as pointing towards and against a continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say, the letter should summarise the considerations which have in fact led to the final decision. It would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship.*"
32. Panels of the Parole Board are independent and are not obliged to adopt the opinions and recommendations of professional witnesses. If a panel intends to reject the evidence of a witness, then detailed reasons will be required. This is implicitly recognised in the case of **Wells** at paragraph 40:

"The duty to give reasons is heightened when the decision maker is faced with expert evidence which the Panel appears, implicitly at least, to be rejecting."

Other

33. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational, but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: "*there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning.*"

34. In **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**, it is said that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide "*objectively verifiable evidence*" of what is asserted to be the true picture.

The reply on behalf of the Secretary of State (the Respondent)

35. In a letter dated 31 May 2023, the Reconsideration Team (Reconsideration Team) of the Public Protection Casework Section responded on behalf of the Respondent to address the Applicant's submission that he had not been charged with a further nine arson offences in addition to the two arson offences ordered to lie on the file. The Reconsideration Team had made numerous attempts to confirm the matter with the arresting police force but had been unsuccessful and therefore could not verify how many arson offences had been left to lie on the file.

Discussion

36. Before addressing the grounds for reconsideration in detail, the following matters are highlighted:
- (a) The reconsideration mechanism is not a process by which the judgment of the Panel when assessing risk can be interfered with lightly. Is it also not a means by which the member carrying out the reconsideration is entitled to substitute his or her view of the facts for the view of the Panel, unless, of course, it is manifestly obvious that there was an error of fact of an egregious nature which can be shown to have directly contributed to the conclusion arrived at by the Panel.
 - (b) When deciding whether the Panel's decision was irrational, due deference has to be given to the expertise of the Panel in making decisions relating to parole.
 - (c) Where the Panel arrives at a conclusion, exercising its judgment based on the evidence before it and having regard to the fact that it saw and heard the witnesses, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the Panel.
 - (d) When considering whether to order reconsideration, appropriate weight must be given to the views of the professional witnesses, but reconsideration cannot be ordered if the Panel has put forward adequate reasons for not following the views of the professional witnesses.
37. It is submitted in the application that the Panel's decision is irrational and procedurally unfair. I will deal with each of the grounds outlined in the application separately.
38. **Ground 1** submits that the Panel failed to give adequate reasons for its conclusions, and in particular, for disagreeing with professional opinion in favour of the Applicant's release and with professional opinion that any further risk reduction work did not constitute core risk reduction work. It is also submitted that the Panel

failed to give full reasons to explain why the proposed RMP is not robust enough to manage risk in the community. The supporting arguments are set out in detail in paragraph 10 above.

39. I do not agree that the Panel does not give adequate reasons for its decision not to direct the Applicant's release. Although this is not argued in the application, I would accept that the Panel's drafting is somewhat inadequate in the conclusion section of the decision however, the factors and considerations it has taken into account in reaching its decision not to direct release are clear. The Panel has provided a detailed account of the evidence taken at the hearing and this should be read alongside its conclusion. The Panel's view is that the Applicant's risk factors are unclear and that assessments of risk are based on hypotheses and tentative formulations. In particular, the Panel expresses its concerns that it does not have an understanding of the function of the Applicant's fire setting and can therefore not be satisfied that this area of risk has been addressed. This view is echoed by the COM who said that she did not know if there was core risk reduction work to complete in respect of fire setting. The Prison Psychologist also stated that she was unclear about the function and triggers of the Applicant's fire setting and although she said that there was no further core risk reduction work outstanding because of the Applicant's stance of innocence, she qualified her view by saying that "*there were significant limitations to her assessment*".
40. In its conclusion, the Panel describes the circumstances leading to the Applicant's decision to abscond and outlines the areas of outstanding work, which are agreed by the witnesses. The Panel points out that the key issue is whether this work should be completed in the community or in custody and gives its view that if the Applicant was in the community, warning signs of risk increasing would not be "*sufficiently evident*" or would not be such as would prompt an immediate intervention.
41. The Panel also discusses other issues relevant to the manageability of the Applicant in the community and expresses the view that the support he would receive would not be adequate to manage his risks. The Panel is unambiguous in its conclusion that if the Applicant "*absconded*", he would be at risk of becoming unstable, making poor decisions, and engaging in risky behaviour. It concludes that if the Applicant offended violently, the risk of serious harm would be high. It is unfortunate that the Panel uses the words "*absconded*" but in this context I consider it can justifiably be interpreted as '*going off the grid*' or disengaging from those supervising him.
42. The application does not mention that there were differences of opinion among the witnesses and that both psychologists qualified several of their assessments. In addition, the COM did not support the Applicant's release "*because every progressive move to date has led to quick reversal*". Although the COM was aware that the Applicant was not eligible for a return to the open estate, her view was that "*a period in open conditions was essential to demonstrate he could cope and it would be way too big a challenge to be released.*" The COM also commented on the Applicant's manageability in the community and stated that he "*would not have the support he needed because of staff capacity and workloads*". She also commented on the Applicant's engagement and said that she "*had not seen enough change that he would be open and communicate with professionals.*"

43. The decision demonstrates that the Panel spent a considerable amount of time in questioning and challenging the witnesses about the Applicant's areas of risks and whether the Applicant's risks could be managed in the community. The application is not accurate in its submission that both psychologists "*had agreed that risk could be managed in the community*". It is striking that the Prison Psychologist's evidence is contradictory and ambiguous on both the Applicant's areas of risks and manageability in the community indicating the complexity of the case and the challenges in assessing future risk. The Prison Psychologist stated that it was difficult to answer whether the Applicant was manageable "*because she didn't fully understand*" his risks, although she added that this was unlikely to change. Similarly, although the PC Psychologist considered that the proposed risk management measures were sufficient to manage the Applicant in the community, he expressed concerns about compliance particularly if the Applicant "*was emotionally dysregulated or stressed as this might affect his ability to remember and follow rules*". The PC Psychologist added, "*the skills learnt in prison may not be transferable to the community*". The PC Psychologist's view was that the Applicant needed "*an extra period in approved premises and more help to adapt, for lots of new learning to take place*" and it is this issue of support which is referred to by the Panel in its conclusion.
44. In conclusion, the Panel was faced with highly nuanced and often contradictory views and assessments about the Applicant's areas of risk and his manageability in the community. It explored these issues thoroughly during the hearing and used its expertise to reach its own assessment of the Applicant's risk and manageability, which I consider is well reasoned. I therefore do not agree that the Panel's decision is irrational.
45. **Ground 2** submits that since the Applicant was not eligible for a move to open conditions, the Panel should not have explored this issue with the witnesses as it led to an incorrect reading of the evidence and a "*skewed approach*" to applying the test for release.
46. The Panel correctly only sets out the test for release in its decision. In paragraph 1.8 of its decision, it confirms that the Applicant is not eligible to return to open conditions. There is no evidence that the Panel explored the test for open conditions in any detail with the witnesses or that it played any part in its decision not to direct the Applicant's release. The COM expressed a view that a period in the open estate was essential as she did not think the Applicant was ready for release. The Prison Psychologist, who had first assessed the Applicant when he was in open conditions, also expressed the same view at one stage, although she later said it was a preference. However, there was no further discussion of the criteria for open conditions and the PC Psychologist was not questioned about open conditions. The Panel faithfully recorded the evidence taken at the hearing which included the views of the COM and Prison Psychologist on open conditions, but no adverse inference should be drawn from this. I therefore reject the submission that this skewed the Panel's approach in its application of the test for release.
47. **Ground 3** submits that the Panel placed weight on (i) the recall and the circumstances surrounding the recall, disregarding the Applicant's account of the recall; and (ii) factually incorrect information leading to it misdirecting itself.

48. The Applicant was released on licence in May 2016 and recalled in October 2016. The Panel sets out a summary of the circumstances leading to the Applicant's recall in paragraph 1.5 of its decision. The account described by the Panel reflects accounts set out in a previous Parole Board decision and several professional reports. The Panel carefully and cautiously refers to the arrangements to meet a woman as "*intelligence*" in recognition that it did not necessarily have the evidence to make a finding of fact on this issue. In relation to the Panel's reference to the Applicant meeting his birth mother which the application submits is factually incorrect, the Panel frames the reference by saying "*is said to have*". I note that in a psychological risk assessment in 2017, the author refers to the Applicant establishing contact with his birth mother and meeting her on several occasions while on licence which he did not disclose to his probation officer at the time. The author goes on to say that the Applicant reported in interview that he had found contact with his birth mother a positive experience. The Panel is perfectly entitled to take account of the Applicant's behaviour when on licence, including deciding what weight to place on allegations and intelligence, in assessing the Applicant's risk. I do not accept these matters have been shown to be factually incorrect and there is no suggestion that they were important factors in the Panel's decision.
49. The application highlights two other issues which it submits led to procedural irregularity or unfairness. The first is the reference to two offences of arson being ordered to be left to lie on the file at the time of the index offences. It is conceded in the application that this is correct, but the point is made that the charges are unproven. As the application is not specific about how this issue is relevant to the Panel's decision, I can only assume that it may be a response to the following statement by the Panel in paragraph 4.2 of its decision, "*they [the Panel] rely upon information in the dossier that indicates previous incidents of fire setting*". The Panel's statement does not specify which incidents it is referring to as there are several incidents and allegations of fire setting described throughout the dossier. I do not consider that this is an unfair or unjustified statement by the Panel, and it serves to highlight the limited understanding of the Applicant's fire-setting risk, as discussed by several of the witnesses.
50. The other issue the application highlights is the reference to nine offences of arson lying on file. The Panel refers to this in paragraph 1.2 of its decision and it frames it as a report by saying, "*it is reported that the police have 9 offences of arson which are lying on file*". No specific weight is attached to this report by the Panel. In my review of the dossier, the first reference to this matter is in a report dated 21 April 2021 by the COM in which she says, "*I am also advised by police that there are 9 other arson offences lying on file. It is apparent [the Applicant] has been in other properties where fires have been started*". This information is repeated in subsequent reports. The Respondent has not been able to provide any further information about this report from the police.
51. Neither the Applicant nor his legal representative challenged this information before or during the hearing and there is no reason therefore why the Panel should not refer to it. There is no indication that the Panel placed any material weight on this report save to the extent that it formed part of its view that the Applicant's risk of fire setting was not well understood which in large part is due to the Applicant maintaining his innocence of the arson-related index offences. This issue forms part only of the Panel's decision not to direct release. For that reason, I reject the

argument that the Panel placed any material weight on this report or treated the two arson offences ordered to lie on the file as proven. Accordingly, the submission that there was procedural impropriety or unfairness resulting in the proceedings being fundamentally flawed and therefore, producing a manifestly unfair, flawed or unjust result, is not accepted.

Decision

52. For the reasons I have given, I do not consider that the decision was irrational or procedurally unfair and accordingly the application for reconsideration is refused.

H Emrys
29 June 2023